Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd

SUPREME COURT (IPOH) — CIVIL APPEAL NO 02-231 OF 1993
ABDUL HAMID OMAR LP, EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
28 SEPTEMBER 1994

Contract *— Damages — No available market — Whether value of goods should be taken at time of breach or when goods were eventually sold — Whether supplier obliged to manufacture goods or could purchase goods for resale where manufacture costs higher than purchase price — Whether proper measure was difference between contract value and purchase price or between contract value and manufacture costs*

Contract *— Damages — Mitigation — Sale of goods — No available market — Whether should have stopped production in view of declining market*

Contract *— Damages — Measure of damages — Sale of goods — Breach by defendant — Whether production should have been stopped immediately upon breach to mitigate losses — Proper measure was difference between contract price and forecasted production costs — Plaintiff entitled to costs of stopping and restarting production*

Contract *— Damages — Sale of goods — Whether supplier could recover costs to market goods to alternative buyers after breach*

The respondent ('the plaintiff') and the appellant ('the second defendant'), as agent for the first defendant, entered into a written agreement ('the agreement') whereby the plaintiff was to supply to the first defendant two million rubber gloves per month from November 1988 to October 1989 for a total price of US$1,848,000. In breach of the agreement, the first defendant failed to issue an irrevocable letter of credit in favour of the plaintiff 30 days before the date of the first shipment of the goods. The plaintiff instituted an action against both defendants, claiming damages of RM6,155,159 being loss of profits, interest, marketing costs and losses incurred. The registrar granted summary judgment on the issue of liability only against the second defendant and this was affirmed by the Supreme Court. In assessing damages, the High Court awarded the plaintiff, inter alia: (i) RM3,102,926.95 for loss of profits based on the proposition that as there was no available market for the gloves, the measure of damages was the difference between the contract price and the price at which the gloves were eventually sold, and not the difference between the contract price and manufacture cost since the plaintiff was only obliged to supply the gloves and not manufacture them; and (ii) RM108,434 for costs incurred in marketing the goods which should have been supplied under the agreement. The second defendant has appealed.

Held, allowing the appeal:

(1) Generally, the value of the goods should be determined at the time of breach but if there is no available market, the value is likely to be based upon the price at which the goods are eventually sold. However, the judge was wrong in determining the value of the gloves at the price at which they were eventually sold as there was no evidence that the gloves were unsaleable at any realistic price at the time of the breach or immediately thereafter.

(2) In assessing the plaintiff's loss of profits, the judge had erred in holding that it was entitled to purchase the gloves instead of manufacture them since, upon construction of the agreement, the plaintiff was obliged to manufacture the gloves itself. This was important since the evidence showed that the manufacture costs would have exceeded the purchase costs.

(3) The plaintiff was under a duty to take reasonable steps to mitigate its loss immediately upon the breach, ie buy or sell in the market, if there was an available market or, if there was none, act reasonably to mitigate its loss. The question of what is reasonable in every case is a question of fact and not law. From the evidence, the plaintiff had continued to manufacture the gloves even after the breach although it would have been reasonable for it to stop further production in view of the declining market.

(4) In the circumstances, the proper measure of damages was the difference between the contract price and production costs. This should be calculated on the assumption that the plaintiff had stopped production at the date of the breach, ie by taking the contract sales value and deducting the forecasted production costs, giving a net forecasted profit of RM717,770. The plaintiff was also entitled to RM210,512 as the costs of stopping production and RM54,617 to restart production, being the consequential loss arising from the stoppage and restarting of production. As these were only forecasted figures provided by the second defendant, the total sum of RM1.2m was felt to be a fair and reasonable amount for loss of profits.

(5) The sum of RM108,434.23 for marketing costs was reduced to RM29,063.47 as the plaintiff had failed to show that the amount of RM79,370.76 had been incurred as a result of the first defendant's breach. Interest of 8%pa was awarded on both sums from the date of writ to date of satisfaction.

Obiter:

The normal measure of damages for breach of contract is prescribed by s 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v Baxendale* (1854) 9 Ex 341. The courts have treated the position under the second limb of s 74(1), that is loss or damage which the parties knew, when they made the contract, to be likely to result from the breach of it, to be similar to the second limb

of *Hadley v Baxendale*, ie the party may recover damages which may reasonably be supposed to have been in contemplation of both the parties, at the time they made the contract.

[Bahasa Malaysia summary

Responden ('plaintif itu') dan perayu ('defendan kedua'), sebagai agen bagi pihak defendan pertama, telah mengikat suatu perjanjian bertulis ('perjanjian itu') di mana plaintif itu dikehendaki membekalkan kepada defendan pertama dua juta sarung tangan getah sebulan dari November 1988 ke Oktober 1989 untuk jumlah harga US$1,848,000. Defendan pertama telah memungkiri perjanjian itu kerana gagal mengeluarkan suatu surat kredit kepada plaintif 30 hari sebelum tarikh hantaran pertama barangan tersebut. Plaintif telah memulakan suatu tindakan terhadap kedua-dua defendan, untuk menuntut ganti rugi yang berjumlah RM6,155,159 sebagai kehilangan keuntungan, faedah, kos pemasaran dan kerugian yang dialami. Pendaftar telah memberikan penghakiman terus atas isu liabiliti sahaja terhadap defendan kedua dan ini telah diesahkan oleh Mahkamah Agung. Apabila mentaksirkan ganti rugi, Mahkamah Tinggi telah mengawardkan kepada plaintif, antara lain: (i) RM3,102,926.95 untuk kehilangan keuntungan berdasarkan proposisi bahawa oleh kerana tidak terdapat pasaran yang sedia ada untuk sarung tangan itu, ukuran ganti rugi adalah perbezaan di antara harga kontrak dan harga pada mana sarung tangan itu akhirnya telah dijual, dan bukannya perbezaaan di antara harga kontrak dan kos perkilangan kerana plaintif hanya diwajibkan membekal sarung tangan tersebut dan bukan mengilangnya; dan (ii) RM108,434 sebagai kos yang ditanggung untuk memasarkan barangan yang seharusnya dibekalkan di bawah perjanjian itu. Defendan kedua telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Secara amnya, nilai barangan seharusnya ditentukan pada masa kemungkiran berlaku tetapi jika tidak terdapat suatu pasaran sedia ada, nilai itu mungkin berdasarkan harga pada mana barangan itu akhirnya dijual. Bagaimanapun, hakim telah melakukan kesilapan apabila menetapkan nilai sarung tangan tersebut pada harga pada mana mereka akhirnya telah dijual kerana tidak ada bukti bahawa sarung tangan itu tidak boleh dijual pada sebarang harga realistik pada masa kemungkiran itu berlaku ataupun sebaik sahaja selepas ia berlaku.

(2) Apabila mentaksirkan kehilangan keuntungan plaintif, hakim telah membuat kesilapan kerana memutuskan bahawa plaintif berhak membeli sarung tangan itu dan tidak mengilangnya kerana, atas pentafsiran perjanjian itu, plaintif diwajibkan mengilang sarung tangan itu sendiri. Ini adalah penting kerana keterangan menunjukkan bahawa kos perkilangan akan melebihi kos belian.

(3) Plaintif mempunyai kewajipan untuk mengambil langkah-langkah yang wajar untuk mengurangkan kerugiannya sebaik sahaja kemungkiran itu berlaku, iaitu membeli atau menjual di pasaran, jika terdapat pasaran yang sedia ada atau, jika tidak ada pasaran, bertindak secara wajar untuk mengurangkan kerugiannya. Soalan mengenai apa yang wajar di dalam setiap kes adalah suatu soalan fakta dan bukan undang-undang. Daripada keterangan, plaintif telah meneruskan pengilangan sarung tangan itu selepas kemungkiran itu walaupun adalah wajar jika ia menghentikan pengeluaran seterusnya memandangkan pasaran yang menurun.

(4) Di dalam keadaan sedemikian, ukuran ganti rugi yang wajar adalah perbezaan di antara harga kontrak dan harga pengeluaran. Ini seharusnya dikira berdasarkan anggapan bahawa plaintif telah menghentikan pengeluaran pada tarikh kemungkiran itu, iaitu dengan mengambil nilai jualan kontrak itu dan menolak kos pengeluaran yang diramalkan, yang memberikan keuntungan bersih yang diramalkan sebanyak RM717,770. Plaintif juga berhak mendapatkan RM210,512 sebagai kos menghentikan pengeluaran dan RM54,617 untuk menyambung semula pengeluaran, yang merupakan kerugian berbangkit yang timbul daripada pemberhentian dan menyambung semula pengeluaran. Oleh kerana jumlah ini hanya merupakan jumlah yang diramalkan yang diberikan oleh defendan kedua, jumlah RM1.2 juta didapati suatu jumlah yang adil dan munasabah untuk kehilangan keuntungan.

(5) Jumlah RM108,434.23 sebagai kos pemasaran dikurangkan kepada RM29,063.47 kerana plaintif telah gagal menunjukkan bahawa jumlah RM79,370.76 telah ditanggung sebagai akibat kemungkiran defendan pertama. Faedah sebanyak 8% setahun diawardkan ke atas kedua-dua jumlah itu dari tarikh writ ke tarikh penyelesaian.

Obiter:

Ukuran ganti rugi biasa bagi kemungkiran kontrak ditentukan oleh s 74(1) Akta Kontrak 1950, yang merupakan penyataan statutori *Hadley v Baxendale* (1854) 9 Ex 341. Mahkamah telah menyifatkan kedudukan di bawah cabang kedua s 74(1), iaitu kehilangan atau kerosakan yang pihak-pihak tahu, ketika mengikat kontrak itu, mungkin diakibatkan daripada kemungkiran itu, sebagai menyerupai cabang kedua *Hadley v Baxendale*, iaitu pihak itu boleh mendapatkan ganti rugi yang boleh dengan munasabahnya dianggap sebagai di dalam fikiran kedua-dua pihak, pada ketika mereka mengikat kontrak itu.]

Notes

For cases on damages, see 3 *Mallal's Digest* (4th Ed) paras 1025–1052; [1989] Mallal's Digest 648; [1990] Mallal's Digest 482–

487; [1991] Mallal's Digest 715–718; [1992] Mallal's Digest 562–570; [1993] Mallal's Digest 466–468.

Cases referred to

Associated Metal Smelters Ltd v Tham Cheow Toh [1971] 1 MLJ 271 (refd)
Banco De Portugal v Waterlow & Sons [1932] AC 452 (distd)
Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 (refd)
British Westinghouse Co v Underground Electric Rys [1912] AC 673 (folld)
Flint v Lovell [1935] 1 KB 354 (folld)
Hadley v Baxendale (1854) 9 Ex 341 (refd)
Harlow & Jones Ltd v Panex (International) Ltd [1967] 2 Lloyd's Rep 509 (distd)
Pasuma Pharmacal Corp v McAlister & Co Ltd [1965] 1 MLJ 221 (folld)
Payzu Ltd v Saunders [1919] 2 KB 581 (folld)
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (folld)
Tatung Electronics (S) Pte Ltd v Binatone International Ltd [1991] 3 MLJ 212 (folld)
Teoh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39 (refd)
The Solholt [1983] 1 Lloyd's Rep 605 (folld)
Quinn v Leathem [1901] AC 495 (folld)
Wimble Sons & Co v Rosenberg [1913] 1 KB 279 (folld)

Legislation referred to

Contracts Act 1950 s 74(1)
Sale of Goods Act 1893 s 50(2) [UK]
Sale of Goods Act 1979 s 50(2) [UK]

Appeal from: Civil Suit No D1–22–1901 of 1989 (High Court, Kuala Lumpur)

Cecil Abraham (*Shearn Delamore & Co*) for the appellant.
G Sri Ram (*Fiona Bodipalar* with him) (*Sri Ram & Co*) for the respondent.

Cur Adv Vult

Mohamed Dzaiddin SCJ (delivering the judgment of the court): This is an appeal by the second defendant, now the appellant, against the decision of the High Court, Kuala Lumpur given on 11 May 1993 on the award of damages in respect of a breach of contract for the supply and sale of ambidextrous non-sterile latex examination gloves. By a written agreement ('the said agreement') dated 1 August 1988 made between the plaintiff and the second defendant as agent for the first defendant, it was agreed

that the plaintiff would supply to the first defendant two million pieces of rubber gloves per month commencing from November 1988 to October 1989 for a total purchase price of US$1,848,000. The breach of contract was the failure of the first defendant to issue an irrevocable letter of credit in favour of the plaintiff 30 days before the date of the first shipment of the goods which was to have been on or before 31 October 1988.

As a result of the breach on the part of the first defendant to issue the letter of credit, the plaintiff instituted an action against both defendants on 16 August 1989, claiming damages for a total sum of RM6,155,159 being loss of profits, interest, marketing costs and losses incurred for its first and second production lines. On 10 July 1990, the registrar granted summary judgment on the issue of liability only against the second defendant and an appeal therefrom to the judge-in-chambers was dismissed on 28 August 1990. On 5 December 1990, the Supreme Court affirmed the decision of the High Court. Meanwhile, the registrar proceeded to hear evidence on the assessment of damages. The hearing concluded on 14 November 1991 without the registrar delivering any decision as she had resigned from service. The matter was then taken over by the High Court judge, who on 11 May 1993, awarded the plaintiff damages in the sum of RM3,102,926.95 for loss of profits and RM108,434 for marketing costs including interest at 8%pa on the total amount from 5 September 1989 until payment, and costs. It is against the assessment of the above heads of damage that this appeal lies.

(1) *RM3,102,926.95 for loss of profits*

The learned judge awarded the sum of RM3,102,926.95 for loss of profits based on the plaintiff's proposition that as there was no available market for the gloves, the measure of damages was the difference between the contract price and the value of the gloves to the plaintiff at the time of the breach, which value was based on the price at which the gloves were eventually sold. According to the plaintiff, the amount which it would have received under the said agreement was RM4,904,264.80. However, as a result of the breach, the plaintiff had to sell the 24 million gloves for RM1,801,337.85, thereby incurring a loss of RM3,102,926.95. In accepting the above formula, his Lordship concluded in his grounds of judgment as follows (at p 24 of the appeal record):

> When a buyer fails or refuses to perform his obligations under a contract for the sale of goods, the seller is ordinarily entitled to the difference between the contract price and the price at which the goods could be sold in an available market, if any. *If there is no available market then the measure of damages would be the full estimated loss of profits resulting from the breach of the contract*: *Lee Heng & Co v Melchers & Co* [1963] MLJ 47; *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17; *Harlow & Jones v Panex (International)* [1967] 2 Lloyd's Rep 509. (Emphasis added.)

It appears that in coming to his decision on the sum of RM3,102,926.95 being the plaintiff's loss of profits, the learned judge rejected the second defendant's proposition that the computation should be by reference to

A the difference between the contract price and the cost of the manufacture of the gloves, the cost of manufacture after the breach being in excess of the resale price. The learned judge found that the second defendant's proposition was founded on a wrong assumption that the plaintiff was obliged under the said agreement to manufacture these goods itself. According to him, the contract obliged the plaintiff to supply the gloves, but not necessarily to manufacture them.

Therefore, the basic question for our decision here is whether the learned judge was correct in his assessment of damages for loss of profits. That raises the question whether he applied the correct principles of law or the amount was based on an entirely erroneous estimate of the damage. (*Flint v Lovell* [1934] 1 KB 354 at p 360.)

In considering the above question, it is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by s 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v Baxendale* (1854) 9 Ex 341 (*Teoh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39; *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76, SC). In essence, the section states that the party may recover any loss or damage for any breach which: (a) naturally arose in the usual course of things; or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it. For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v Baxendale*, which is, the party may recover damages which may 'reasonably be supposed to have been in contemplation of both the parties, at the time they made the contract'. See *Associated Metal Smelters Ltd v Tham Cheow Toh* [1971] 1 MLJ 271. The English equivalent to our s 74(1) is s 50(2) of the Sale of Goods Act 1979, which was framed in terms of the first rule in *Hadley v Baxendale* (*McGregor on Damages* (15th Ed) at para 835). Thus, s 50(2) states that the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. If there is clearly no available market, then, consequential loss apart, the damages will be assessed at the contract price less the value of the goods to the plaintiff at the time of the breach, which value is likely to be based upon the price at which the goods are eventually sold (ibid, at para 836). Any relevant evidence may be admissible to prove this value (*Benjamin's Sale of Goods* (4th Ed) at para 16–068).

Thus, with the above principles in mind and after considering the record and the written submissions of counsel, we find the learned judge had misdirected himself in two fundamental respects with regard to the proper measure of damage for loss of profits. First, in arriving at his assessment of the plaintiff's loss of profits where there was no available market for the gloves, he erred in holding that the plaintiff was entitled to purchase the gloves at the time of the breach, instead of manufacture them. His Lordship held that under the said agreement the plaintiff was obliged to supply 24 million gloves, but not necessarily to manufacture them itself. With respect, we cannot agree, since upon a construction of

the said agreement, the plaintiff was obliged to manufacture these 24 million pieces of gloves itself for supply to the first defendant. Upon examination of the several documents exhibited in bundle C of the appeal record, we are satisfied that the principal activity of the plaintiff when it commenced business operations on 1 November 1988 was that of manufacturing rubber gloves. A

It is also clear from the said agreement, under 'Quality', the plaintiff was to manufacture these gloves. See also the company's annual report and accounts on 31 December 1988 — at p 755 of bundle C. In addition, Encik Ramalingam, the plaintiff's managing director (PW1), had testified that the company was incorporated in early 1988 and the first plant for the manufacturing of gloves was set up in July 1988, with the first one million gloves produced in the middle of October 1988. In a letter to the second defendant's marketing manager dated 18 July 1988, PW1 categorically stated that the company would manufacture natural rubber examination gloves from September 1988 — at p 776. In a further letter of 22 September 1988, it was again stated that the company manufactured non-sterile latex examination gloves with a plant capacity of 15 million gloves per month by March 1989 — at p 779. We have already pointed out that, contrary to what the learned judge had held, the plaintiff was contractually bound *not* merely to supply but also to itself manufacture, 24 million pieces of gloves to the first defendant. This was an important factor in considering the quantum of damages to be awarded, since, upon the evidence, the cost of such manufacture which would have been incurred by the plaintiff, would have exceeded, by far, the cost of purchase. B C D E

It is trite that the plaintiff must prove the loss although the standard imposed on it is not a high one. Thus, even assuming that the learned judge was right to conclude that the plaintiff was obliged to supply but not necessarily to manufacture the 24 million gloves, still, we find the evidence unsatisfactory with regard to the purchases and the resale of these gloves. PW1 testified that the plaintiff bought these gloves between late 1989 and early 1990, but he did not know how much had been paid for them. He added that during that period, it was cheaper to buy gloves than to manufacture them. In the same breath, he admitted that the plaintiff had manufactured gloves until about April 1990 when it stopped production. As for the resale, he stated it managed from time to time after the breach to dispose of the 24 million pieces of gloves without formal contracts, but on a one-off basis for the total price of RM1,801,337.85. F G

This brings us to the question: at which point of time is the value of the goods to the plaintiff (seller) to be determined? Generally, it is determined at the time of the breach and, we would stress, any relevant evidence may be admissible to prove this value. In the present case, it is clear to us that the learned judge determined the value of the 24 million gloves to the plaintiff not at the time or date of the breach, but at the time at which they were eventually sold by the plaintiff, following the English High Court decision in *Harlow & Jones Ltd v Panex (International) Ltd* [1967] 2 Lloyd's Rep 509, where Roskill J held, inter alia, that as there was no available market, the measure of damages was that provided in s 50(2) H I

of the Sale of Goods Act 1893, ie the difference on 30 September 1966, between the contract price of the goods and the then value of the goods to the sellers. The relevant facts of the case were these. A contract was concluded between the plaintiff sellers and defendant buyers for sale of 10,000 tons of Russian steel (fob) which the sellers were buying from their Russian suppliers. The contract provided for the goods to be delivered during August/September 1966 in the supplier's option, the last date being 30 September 1966. His Lordship stated (at p 530):

> What is now said is that on 30 September the contract had finally been broken by the defendants, and the plaintiffs had these goods on their hands with the Russian sellers claiming against them and with no market in which to dispose of them. To my mind, the measure of damages is the difference on 30 September between the contract price of the goods and the then value of the goods to the plaintiffs. That is the loss which, in the language of the Act, on the facts of the case, flows directly and naturally from the defendants' breach.
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> I have already said there was no market at any material time. I think the plaintiffs were in great difficulty, and I think the difficulties were entirely of the defendants' making. *I have got to put the best value I can upon these goods as at 30 September, when the evidence shows they were, for all practical purposes, unsaleable at any realistic price. I have to pay regard to all the relevant factors* and I have done so. *I see no reason for putting their value at that date any higher than the figure at which the 8,500 tons were ultimately sold.* (Emphasis added.)

Thus, it is important to stress here that Roskill J, in assessing the value of the 8,500 tons of steel not at the date when the contract was broken, ie on 30 September, but upon the price at which they were eventually sold, had before him the evidence, first, that the plaintiffs had these goods on their hands on 30 September, and, secondly, they were, for all practical purposes, unsaleable at any realistic price. In the circumstances, his Lordship found no reason for putting their value as at 30 September any higher than the figure at which the goods were ultimately sold.

On the other hand, there was no satisfactory evidence in the present case that the plaintiff had the first consignment of two million gloves ready for shipment by November 1988. PW1's evidence was that it would be able to ship the two million gloves by 30 November although it had not made any booking for shipping space. It must be remembered that in fob contracts, the seller must at his own expense put the goods on board a ship which has to be nominated or designated by the buyer (*Wimble Sons & Co v Rosenberg* [1913] 1 KB 279 at p 282). Secondly, there was no evidence that these gloves were unsaleable at any realistic price if they were to be sold at the time of the breach or immediately thereafter. The plaintiff had only managed to show that there was no available market at the material time or within the fourth quarter of 1988 because the price had dropped considerably. Clearly, the facts and circumstances of the present case are different from *Harlow & Jones*. This leads us to the conclusion that the learned judge was wrong to follow the principle in *Harlow & Jones* in determining the value of the 24 million gloves not at the time of the breach

but upon the price at which they were eventually sold by the plaintiff. Here, we would reiterate that *Harlow & Jones* was decided upon the particular facts and circumstances of that case. A case is only an authority for what it actually decides (*Quinn v Leathem* [1901] AC 495 at p 506).

The second misdirection relates to the question of mitigation of damages. It is settled principle that the plaintiff is under a duty to take reasonable steps to mitigate the loss consequent to the defendant's wrong and he will not get damages in respect of any part of the loss which is due to his neglect to take such steps (*British Westinghouse Co v Underground Electric Rys* [1912] AC 673; *Pasuma Pharmacal Corp v McAlister & Co Ltd* [1965] 1 MLJ 221, FC at p 227). In the sale of goods, the principle of mitigation is a foundation of the normal rule for the measure of damages which requires the innocent party to act immediately upon the breach, buy or sell in the market, if there is an available market. Even in the absence of an available market, the innocent party must act reasonably to mitigate his loss. (*Benjamin's Sale of Goods*, supra, at para 16–044). The question of what is reasonable or whether the plaintiff has acted reasonably in mitigation of his damages in every case is a question of fact and not law (*Payzu Ltd v Saunders* [1919] 2 KB 581 at p 588; *The Solholt* [1983] 1 Lloyd's Rep 605, CA).

From the evidence adduced on behalf of the plaintiff, it is clear that the plaintiff continued to manufacture the 24 million gloves even after the breach. Ultimately, the company managed to dispose of the whole lot for RM1,801,337.85. Consequently, it closed down the factory in April 1990. In addition, there was the undisputed evidence of PW1 that after the breach and during the fourth quarter of 1988, the market for gloves had deteriorated badly. In 1989, there was a glut of rubber gloves in the market. During that period, many manufacturers had to sell their gloves below the cost of manufacture and it was cheaper to buy than to produce the gloves.

Against the above incontroverted evidence, the learned judge, however, found that in the circumstances of the case, the plaintiff had acted reasonably in mitigating its loss, adopting the following statement of principle by Lord Macmillan in *Banco De Portugal v Waterlow & Sons* [1932] AC 452 at p 506:

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

In *Banco De Portugal*, a firm of printers employed by the Bank of Portugal to print a series of banknotes known as Vasco da Gama 500 escudo notes, delivered to the bank 600,000 notes which were put into circulation in Portugal. Subsequently, in breach of their contract of employment, the printers delivered to one M, the head of a band of criminals, 580,000 notes of the same type, printed from the original plates or from plates made from the same die, in the belief that he had the authority of the bank. M and his associates introduced these false notes into Portugal and put a large number of them into circulation. The bank, on discovering that unauthorized notes were in circulation, issued notices withdrawing the whole of this issue of Vasco da Gama notes and undertaking, within a limited time, to exchange all notes of this type presented to the bank for other notes. The bank had an exclusive licence to issue bank notes as legal tender in Portugal, but the amount of the notes to be issued was controlled by law. At all material times the currency was inconvertible. In an action by the bank against the printers for breach of contract, the printers maintained: (1) that the loss suffered by the bank was due to their own voluntary action in paying the unauthorized notes; and (2) that the loss to the bank was limited to the cost of printing and paper in regard to the new issue. The House of Lords, in holding that the loss arose naturally from the breach of contract stated, per Lord Macmillan (at p 505):

> The Bank in my view was justified in taking immediate action when it did, for the fact of the existence in the currency of a large number of spurious notes became a matter of public knowledge almost simultaneously with its discovery by the Bank, and if a panic was to be averted it was essential to take action at once. I equally think that having properly announced the withdrawal of the notes and its intention to honour all such notes in the hands of the public, it was not possible for the Bank to alter its policy until a reasonable time had been given to the public to effect the exchange. To have honoured the spurious notes so long as it could not tell them from the genuine notes and then to cease to honour them when it acquired the means of discrimination would have created a second panic, and such a course of conduct on the part of the Bank would have been grossly unfair. If the only way to avoid a panic was to honour good and bad notes alike, as I think in the circumstances it was, the Bank's ability to distinguish between them becomes an irrelevant consideration. Moreover the Bank was quite unable to say with regard to any particular spurious note presented to it whether it had not itself unwittingly reissued it into circulation and so become responsible for it.
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> ... In my opinion the action of the Bank in honouring all notes of the type in question, genuine and spurious alike, between 7 December and 26 December 1925, was reasonable and justifiable in the circumstances, and Messrs Waterlow ought to be held responsible for whatever loss was occasioned to the Bank by the adoption of that policy.

It must be appreciated that the 'emergency' which Lord Macmillan was talking about obviously related to the peculiar facts and circumstances of that case. Again, in our view, that case is totally distinguishable from the facts and circumstances of the present case. Here, there was no question of the plaintiff being placed in a position of embarrassment or an

'emergency'. There was ample time, upon realizing the occurrence of the breach, for the plaintiff to reconsider whether or not, in the light of the low price for rubber gloves at the material time, the management should continue or cease manufacture in order to save costs. There was no evidence of any panic in the market as a result of the glut. On the contrary, according to PW1, many manufacturers had sold their supply below the costs of manufacturing. Whilst we appreciate that the learned judge had correctly applied his mind to the statement of principle of Lord Macmillan that in the law of mitigation of damages, the plaintiff is only required to act reasonably, we are, on the other hand, of the view that, based on the evidence which we have highlighted above, the learned judge was wrong to come to the conclusion that the plaintiff had acted reasonably and with justification in mitigating the loss of profits.

On the contrary, we find it was quite reasonable for the plaintiff to have stopped manufacture of the gloves as soon as it became aware of the breach by the first defendant's failure to open the letter of credit. It must be remembered that under the said agreement, the plaintiff was required to manufacture two million pieces of gloves per month beginning from November 1988. It was also in evidence that the plaintiff was just about to start manufacture of the remaining contracted gloves. It would not, therefore, be unreasonable for it to stop further production of the gloves for the subsequent months after the breach. In our view, the plaintiff's management should at that point of time have made a decision whether to stop further manufacture or to continue to do so.

Secondly, the plaintiff was aware that at the time of the breach or some time thereafter, the demand for rubber gloves had deteriorated badly and there was a glut in the market. In such circumstances, the plaintiff's management must have realized that the costs of continued production of the gloves for supply under the said agreement, which at that point of time had come to an end, would be much higher than the receipts it would have got from the sale of the gloves when they were ultimately sold. Hence, would it not be prudent for the plaintiff, in such circumstances and in the ordinary course of business, to stop production of the gloves in order to save costs, at least until such time when the market improved?

For reasons stated, in our judgment, the learned judge had erred in principle in his assessment of damages for the loss of profits. As stated by Greer LJ in *Flint v Lovell* [1935] 1 KB 354 [at p 360]:

> ... I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary *that this court should be convinced either that the judge acted upon some wrong principle of law*, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, *an entirely erroneous estimate of the damage to which the plaintiff is entitled.* (Emphasis added.)

In our opinion, in the circumstances of the case, the proper measure of damages is the difference between the contract price and the costs of production of these gloves. That would be the loss which flows directly and naturally from the first defendant's breach. In such a situation, the loss of profits should be the profits that the plaintiff would have made if it had proceeded with the production of the gloves in accordance with the terms of the said agreement. However, having regard to our observation earlier that it would not be unreasonable for the plaintiff to stop production of the gloves after the breach occurred in view of the declining market for gloves at the material time, the loss of profits should therefore be calculated on the assumption that the plaintiff had stopped production of the gloves at the date of the breach. In this regard, we would accept the method adopted in exh 46 as a reasonable way of assessing the loss of profits. According to Encik Yong Boon Sik, the second defendant's accountant (DW2), he worked out the contract sales value and deducted the production cost, but since there was no actual production cost because the contract was not performed, he used the forecasted production cost from October 1988 to November 1989. So the forecast of profit for 1989 came to RM1,067,983 and for October to December 1988 there was a forecast of loss of RM350,213. Therefore, the net forecasted profit, if the plaintiff had stopped production, would be RM717,770. DW2 then added RM210,512 and RM54,617 being the stopped production costs over 12 months and restart production costs, respectively, which the plaintiff was entitled to, being the consequential loss arising from the stoppage and restarting of production. In *Tatung Electronics (S) Pte Ltd v Binatone International Ltd* [1991] 3 MLJ 212 at p 215, the Singapore Court of Appeal stated:

> The law is clear: where, as a result of a defendant's breach of contract, a plaintiff takes steps to mitigate and incurs reasonable expenses, the plaintiff may recover damages to indemnify him in respect of these expenses. The mere fact that the defendant was unaware of the specific nature of the expense incurred would not affect his liability to indemnify the plaintiff.

Therefore, based on D46, had the plaintiff stopped production of the gloves at the time of the breach, the loss of profits should be RM982,899.

We note that the computation in D46 by DW2 was called into question because in the first place, he was not an expert as he was never involved in the business of manufacturing rubber gloves and, secondly, D46 was based on a forecasted production cost. It was, therefore, suggested by counsel for the plaintiff that there was no probative value in D46. Having accepted the formula that the proper measure of damages in this case to be the difference between the contract price and the cost of production, we find D46 affords reliable guidance to us in quantifying the loss of profits. However, having regard to the fact that D46 was based on a forecasted production cost, we feel the plaintiff's loss of profits should be more than RM982,899, especially since it would be natural for DW2 to understate the loss of profits. In the circumstances of the whole case, a fair and reasonable amount for the plaintiff's loss of profits should be RM1.2m.

(2) *Marketing costs of RM108,434*

The learned judge awarded the above amount being marketing costs to compensate the plaintiff for incurring expenses in marketing their gloves which would otherwise have been supplied to the first defendant under the contract. However, how this amount was arrived at was not elaborated upon by his Lordship in the grounds of judgment. From the record, it would appear that he accepted in toto the plaintiff's marketing costs schedule, P21AC, which showed the breakdown of the expenses purportedly incurred by the plaintiff company in respect of air travel to market these gloves; courier, postage, telephone, facsimile and forwarding charges; and claims for food and lodging incurred by the plaintiff's staff whilst travelling in connection with its marketing of the gloves. According to Encik Cecil Abraham, the plaintiff had failed to show that these costs were linked to the first defendant's breach. Counsel submitted that the claim of RM38,552 for air fares were for trips unconnected with the said agreement. They were made before the said agreement had been breached by the first defendant. Moreover, these trips were made by Mr Ramalingam on behalf of MRY Associates and not for the plaintiff. With regard to the telephone charges, counsel contended that the plaintiff had not clearly shown whether they were telephone calls made relating to the first defendant's breach.

For this head of damages, the plaintiff was entitled to claim for such amount as it could prove to be clearly attributable to the first defendant's breach of the said agreement. In this regard, we would approve what was stated in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 367:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v Williams* 109 ER 842). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages. See, for example *Dixon v Deveridge* (1825) 2 C & P 109; 172 ER 50 and *Twyman v Knowles* 138 ER 1183.

From the invoices, we are satisfied that the amount of RM38,552 for air tickets were for trips made to the United States and United Kingdom which were not only unconnected with the said agreement, but also for trips made to secure the alternative sales of the plaintiff's gloves before the breach of the said agreement occurred. According to PW1's evidence, the first marketing trip was made about a week after the said agreement was signed for the purpose of getting a better feel of the market and to look for additional market for the company's second line. He admitted that the claim for marketing trips was included as damages because when the first defendant reneged on the said agreement, the plaintiff had sold the gloves to some of the customers they met during the marketing trips. PW1 also agreed that when he made the marketing trips in August 1988, there was no breach of the said agreement. As for MRY Associates, PW1 did admit

A that it was his own company and that it had no connection with the plaintiff. In addition, there was a claim for food and lodging in connection with these trips in the sum of RM32,480.34.

On the claim of RM8,338.42 for telephone charges, PW2 was unable to show how these calls were attributed to the plaintiff. Some of the
B telephone charges came from the telephone of its marketing executive. He was quite honest to admit that he was unable to say whether the telephone charges were for calls relating to the breach of the said agreement.

As the above three items have been shown to be unconnected with the plaintiff's business, a sum of RM79,370.76 should be deducted from the award of RM108,434.23 as the plaintiff had failed to show that the
C charges for air fares, food and lodging and telephone bills were incurred as a result of the first defendant's breach of the said agreement. Accordingly, we substitute the marketing costs of RM108,434.23 with the sum of RM29,063.47.

We, therefore, allow this appeal by setting aside the order of the High
D Court dated 11 May 1993 and substitute an order that the second defendant do pay to the plaintiff the following sum as damages:

(1) RM1.2m for loss of profits;

(2) RM29,063.47 for marketing costs;

E (3) interest at 8%pa from the date of the writ until full satisfaction; and

(4) half the costs of this appeal to the second defendant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim

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